United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

ORIGINAL
WITH PROOF
OF SERVICE

76-2136

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P/S

ERROLL HOLDER,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLANT
AND SUPPLEMENTAL APPENDIX

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- -x

ERROLL HOLDER,

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-against-

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- -x

ISSUE PRESENTED

Whether Erroll Holder was denied the effective assistance of counsel by his waiver of his right to have a separate attorney represent him at the trial; whether that waiver was a knowing, intelligent and intentional relinquishment of that right considering the conflict of interest of his attorney and the hearing conducted by the Trial Judge to resolve the issue.

STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This is an appeal from a denial of a motion pursuant to 28 U,S.C. § 2255 for an order vacating the petitioner's sentence and granting a new trial. This order was entered on September 14, 1976 in the United States District Court for the Southern District of New York (Bonsal, J.). The motion sought to vacate the judgment of the

United States District Court for the Southern District of New York (Bryan, J.) rendered on June 26, 1973, convicting the appellant of violations of the Federal Narcotics Laws and sentencing him to twelve years' imprisonment. The conviction was affirmed by the Court of Appeals and a petition for a writ of certiorari to the United States Supreme Court was denied. United States v. Sisca, 503 F. 2d 1337 (2d Cir.), cert. denied 419 U.S. 1008 (1974).

B. Statement of Facts

On October 16, 1972, Indictment 72 Cr. 1159 was filed in the Southern District of New York. It charged the Appellant with conspiracy to violate the federal narcotics laws and the use of the telephone to further these violations (Joint Appendix 88). Among others, the indictment also named as co-conspirators Willie Abraham, Robert Hoke, Walter Grant, Alphonse Sisca and Margaret Logan. A six-week jury trial resulted in verdicts of guilty as to all these named persons (J.A. 88).

At the trial, all of the named persons were represented by the firm of Lenefsky, Gallina, Mass, Berne and Hoffman (hereinafter referred to as the "Gallina" firm). Mr. Holder was represented specifically by John Pollok, while Abraham, Logan and Grant were represented by Jeffrey Hoffman, Hoke by Robert Kienan, and Sisca, the lead defendant, by Gino Gallina (J.A. 89).

On November 22, 1972, Judge Bryan conducted a hearing to resolve any possible issues arising from the multiple representation. This hearing was ordered after the Government's request that any possible conflicts of interest be resolved prior to the trial. At the hearing all the defendants were represented by Mr. Gallina (J.A. 90).

Mr. Gallina indicated to the Court that the Government's desire to have separate attorneys was an attempt to weaken the defense by preventing them from unifying their position and that it would shore up a weak case (Hearing, November 22, 1972, p. 16). The Government, through Assistant United States Attorney W. Cullen McDonald, suggested that its action was motivated by a desire to insure that should there be a conviction, it would not be subject to attack on this issue (11/22, p. 8). To this end, he suggested that the Court appoint counsel for each defendant solely to advise them on their choice of counsel for the trial (11/22, p. 10). The Court rejected this suggestion (11/22, p/ 22, 40).

Instead, after a brief resume of the type of case to be tried, Judge Bryan questioned each defendant separately. In conclusory terms, he apprised them that a conflict may arise among the various defendants, that it is dangerous for one lawyer to represent more than one defendant, and, in general, that the defendant carefully consider his or her choice. He then asked each of them if they still wanted to stay with the Gallina firm and each answered in the affirmative. (11/22, p. 22-37).

Judge Bryan concluded that the defendants had made, "a free election that each "has freely exercised his or her choice of counsel and with full realization of the possibilities or, indeed, the probabilities that some conflict of interest may develop..." (11/22, p. 43).

During the trial, which commenced some six weeks later, a motion was filed for the first time, asking that the wiretaps to be utilized at the trial be suppressed on the grounds of improper minimization (J.A., p. 93). This motion was eventually denied as

untimely. To a very large extent, the Government's case rested on conversations which had been monitored. The tapes of these conversations were played before the jury. Although there were literally hundreds of hours of conversations containing the voices of most every defendant, only four conversations were alleged by the Government to contain the voice of Alphonse Sisca (J.A. 7-13).

Mr. Sisca was represented personally by Gino Gallina. It was his defense that the voice was not Sisca's (J.A. 13). To that end, he called several voiceprint experts to state that it was not his client (J.A. 13).

The various lawyers from the Gallina firm who represented the other five defendants, including Mr. Holder, presented no defense on their clients' behalfs. All six defendants named were convicted. The Court of Appeals upheld all the convictions and certiorari was denied

Pursuant to the § 2255 motion filed in this matter in the Court below, Judge Bonsal ordered an evidentiary hearing, which was held on May 25, 1976. The hearing was limited to "taking evidence on the issue of 'informed consent'" (J.A. 52). Gino Gallina testified that in the morning of November 22, 1972, prior to the hearing before Judge Bryan, he had a joint meeting with five of the six defendants his firm represented (J.A. 94). Mr. Sisca was not present. He stated that they discussed conflict of interest and joint representation (J.A. 94). Mr. Holder and Mr. Abraham testified that Mr. Gallina told them that the Government wanted to separate the defendants in order to shore up a weak case, and that they should answer the Court's questions in a manner that would result in the Gallina firm remaining as his or her attorneys (Hearing, May 25, 1976, p. 48-51). Holder testified that he did not understand what the Court meant by a conflict of interest

nor the nature of the danger that it might create (5/25, p. 57-59).

Decision of the District Court (J.A. 87-97)

Judge Bonsal denied the motion. He held that Judge Bryan acted in conformity with the approved practice by conducting a hearing to determine whether there exists such a conflict that will prevent the defendant from receiving the effective assistance of counsel. After the defendants understand the possibility that a conflict may result in the compromise of their defense, they must be given the opportunity to decide if they wish to be jointly represented.

In this case, the Court held that Judge Bryan "carefully questioned each petitioner as to his desire to continue with the Gallina firm after pointing out the possibilities of conflicts of interest and that, under the circumstances, the trial court protected petitioners' constitutional rights to effective assistance of counsel." (J.A. 96).

ARGUMENT

POINT I

What happened in the instant case, and it is by no means a rare circumstance, really presents two difficult problems for our criminal justice system. First, how far an inquiry is a court obligated to make before permitting multiple representation? Second, how is a court to deal with a defendant who is getting advice and making decisions thereto from a lawyer who, it turns out, was not acting in that client's interest, but in the interests of another? Though difficult under some circumstances, resolution of the problems here, however, was possible. The Court erred in not resolving them properly.

Certainly, by this time, no one disputes the reasons why the circumstances developed as they did. Gino Gallina had an extremely important interest in the successful representation of Alphonse Sisca. This was the client to whom he had the most attachment. As the lead attorney in the case, it was Gallina's function to do whatever was necessary to exonerate Sisca. Whether his defense would jeopardize the fate of anyone else in the case was not his or his firm's concern, and in the normal case, neither should it be. After all, a lawyer, upon being engaged, is obligated to defend his client to the best of his ability, without regard to the interests of others. A client expects this and is entitled to this.

Gallina, however, went one step further. He got himself and

other members of the firm involved in the representation of co-defendants in the same case because he also felt that this would be in the interests of Sisca. In spite of the obvious antagonism between the positions of Sisca and the five others, Gallina took the latters' cases in order to prevent them (their lawyers) from raising defenses which could hurt Sisca at the trial. By doing so, he effectively prevented them from taking the witness stand, from becoming a government witness in return for leniency, or from taking any other action in their own interest.

Very specifically, Gallina knew that the weakest case the Government had was against his client, Sisca. They had really only one incriminating telephone conversation allegedly participated in by Sisca, and a very small amount of direct testimony placing Sisca at certain places. The agents would testify that the overheard voice on the telephone was Sisca's. An alibi for the direct testimony would not be enough to convince the jury that the agents were mistaken or lying about Sisca's involvement. However, if the telephone conversations allegedly involving Sisca were admitted as evidence, and Gallina could show that unequivocally, the voice was not only not Sisca's but, in fact, some other specific person, the jury could not believe the agents' and the Government's version of the case.

Gallina had evidence that the voice was not Sisca's. Several voiceprint experts confirmed that it was not Sisca's voice. Ironically, these experts were the leading ones in the country and in previous cases had testified for the Government who, naturally, had vouched for their expertise. Not only that, but Gallina made available a recording of another person to these experts who confirmed that he was the one who was actually overheard by the agents on the wiretap.

With such tremendous ammunition, it was imperative that the tapes of the conversations be admitted into evidence. Unfortunately, for the other five defendants, and specifically Mr. Holder, the tapes were the most damaging piece of evidence against them.

A more classic situation of a conflict had rarely arisen. This, however, was of no concern to Gallina. His only concern was how to exonerate Sisca and, at the same time, prevent the other five from understanding the machinations of his defense. In order to do this, it was necessary for the Gallina firm to continue representing the others. They knew that as soon as any lawyer investigated the facts of the case, it would be clear to him or her that there was an irreconcilable conflict so damaging that it was impossible for one defendant to expect exoneration without the concomitant disintegration of the others' chances for acquittal. The lawyer would immediately make a motion for suppression of the tapes, as well as take any other appropriate action.

Fortunately for Gallina, he effectively controlled the five; they, in turn, trusted him. After all, he was their lawyer. Other members of his firm would represent them but it would be a joint effort. He pitted the Government against them as a unit, neglecting to mention Sisca's antagonism. He gave them completely false information about their cases. Holder was told that the Government's case against him was weak. This was not the case. He neglected to tell Holder about the damaging tapes. According to Holder, he never even saw a copy of the indictment nor did he meet John Pollok until two days before the trial started.

Gallina told the defendants that each one's best chance at

acquittal rested on their joint unity with each other and with Sisca. He knew this was not true. He attributed a motive to the Government which, though possibly true, only helped him to convince Holder that the Government was seeking to break up the defendants to gain an advantage. Holder had no recourse but to accept his lawyer's advice, having been given no factual background to do otherwise. In the end, he obeyed Gallina's instructions to answer any of Judge Bryan's questions in a manner designed to insure the continued joint representation.

Subsequent events bore out Gallina's master plan. In spite of contradictory testimony by John Pollok, Gallina claimed that he was not aware if the applicability of a minimization motion until the trial commenced. Therefore, no such motion was filed pre-trial. We agree with this Court's view, as cited by Judge Bonsal below, that, "the decision not to file a pre-trial minimization motion was a deliberate trial tactic..." (Opinion, p. 10), referring to United States v. Sisca, 503 F. 2d 1337 (2d Cir.) cert. den. 419 U.S. 1008 (1974). It was a deliberate tactic to assist Sisca to the detriment of the others. By delaying the filing of the motion, Gallina hoped to have his cake and eat it too. Unfortunately for Holder, the delay was considered an intentional waiver.

With this scenario, one can easily see the predicament in which Mr. Holder found himself, albeit unknown to him at the time. He was given a completely false version of the factual significance of the case against him as well as legal opinions that were antagonistic to his interests. Based upon these erroneous assumptions, Holder made a decision in court which prejudiced his chances at the trial. Under no stretch of imagination was this decision made knowingly

intelligently and voluntarily.

Judge Bryan, aware of the possibility that Holder was doing something that would prove to be against his own interests, wisely conducted a hearing. This hearing as conducted, however, was a woefully inadequate attempt to insure that the Appellant's decision was being made with full knowledge of the facts and the consequences.

This hearing, held according to the law as set down in United States v. DeBerry, 487 F. 2d 448 (2d Cir., 1973); United States v. Mari, 526 F. 2d 117 (2d Cir., 1975) follows this Circuit's decision in United States v. Alberti, 470 F. 2d 878 (2d Cir., 1972), cert. den. 411 U.S. 419 (1973). The Court stated that where there is a potential conflict, the trial judge should,

> "... conduct a hearing to determine whether there exists a conflict of interest with regard to defendants' counsel, such that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment. In addition, the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict, and is given an opportunity to express his or her views. Id. at 881-882

While giving lip service to this two-part analysis in his decision below, Judge Bonsal did not really indicate how these specific requirements were met by Judge Bryan. Had he done so, he would have had to conclude that Judge Bryan simply didn't come to grips with the very real problems confronting Mr. Holder. As will be demonstrated, Judge Bryan neither determined whether there existed such a conflict so as to deny Mr. Holder the effective assistance of counsel; nor did he make Mr. Holder aware of the facts underlying this conflict.

We agree with the Government in its memorandum submitted below

on page 3 that, "[N]o single procedure is required..." What a court must do varies with the individuality of the case before it. Unlike most of the cased cited by Government, here the same lawyer or law firm was representing six people in the same indictment. When the matter came on to be heard before the Court, only one lawyer appeared for all the defendants. According to Gallina's own testimony, he was to represent Alphonse Sisca at the trial, and, according to him, he met with the defendants, except for Sisca, just prior to the hearing at his office. In other words, the Court was aware that Gallina, who would presumably represent Sisca, the main defendant, was now the only lawyer advising these other five defendants whether to remain with the firm. Again, not one other defendant, but five.

The Court, therefore, had the unmistakeable indication that the potential for conflict was not only possible, but probable (a conclusion in which he verbally concurred, 11/22, p.27), but more importantly, that Gallina, the architect of the conflict, was the sole person advising the defendants not to be concerned with the multiple representation. Judge Bryan's response to this obvious problem was basically to ignore it.

He did this by failing to find that an actual conflict existed, the first requirement of Alberti. He didn't probe the prosecutor as to the nature of the charge with respect to the specific individual caught in the possible conflict. He didn't even attempt to inquire of Gallina whether there was a factual basis for a conflict with respect to the defense of each individual vis-a-vis any or all of the other five defendants represented by him. Indeed, Gallina

was never even asked whether, in his opinion, simply as a conclusion, there was a possibility of a conflict.

What Judge Bryan did do was simply assume that Gallina carefully explained the factual background of the Government's case to each, pointing out those areas of possible conflict. In light of Gallina's own statements to the Court, this was clearly a false assumption. The only response Gallina made at the hearing was to attach a motive to the Government's request. Nothing that Gallina said shed light on the existence of an actual conflict. Judge Bryan should have at least attempted to ascertain what Gallina's feelings were on this subject and if he communicated this to his clients.

That is one of the reasons this case is distinguishable from the others cited by the Government. Here, unlike Mari, no inquiry was made of the attorney to help the Court determine whether a factual conflict existed. Here, unlike United States v. Wisniewski, 478 F. 2d 274, (2d cir., 1973), the Court made no inquiry of the defendants as to what their lawyers explained to them and whether they understood what was said.

All Judge Bryan did here was to ask each defendant if, aware that there was a possibility of a conflict, each wanted to remain with the Gallina firm. The Judge did not indicate to them that he, in fact, viewed the situation as rife with conflict; nor did he, because he had no basis for doing so, indicate the factual basis for any apparent conflict.

In reality, Judge Bryan did not appreciate in this situation that the conflict would not only be a factual one which would rear its head when the lawyer was making trial decisions, but that the

conflict was exhibiting itself at the very instant he was conducting the hearing. This was not the situation where the lawyer was going to be faced with a difficult decision at the trial as it progressed, having exhibited and hopefully feeling no preference for one client over another. Here, as was obvious to any observer, especially one trained in the law, the lawyer was consciously, intentionally and venally instigating and continuing the conflict in order to assist the sole individual with whom he was concerned.

Under these circumstances, Judge Bryan was not entitled to accept Gallina's own statement that he explained the conflict to his clients since any explanation was an attempt to cover up the real situation. Judge Bryan had to go behind the scenes, using whatever tools he had available. He chose none.

In order to determine whether a conflict did exist, the first requirement of DeBerry, Judge Bryan had to have at least a summary understanding of the case as it applied to each conflicted defendant. In order to aid him, he could have appointed an independent person to evaluate the situation by talking to the prosecutor, as well as Mr. Holder. He could have inquired of Gallina as to exactly what steps he took and exactly what explanation he gave to the defendants to apprise them of the conflict. He could have asked Gallina what his advice was to each client. He could have asked each defendant to explain in their own words what a conflict was and if, in this case, each felt there was a conflict. Mr. Holder could have been asked to explain what Gallina told him about a possible conflict and what it meant in the case. Any of Judge Bryan's inquiries of this type could have been done in camera if sensitive.

Had Judge Bryan conducted any type of probing inquiry, he would have concluded that not only would a conflict arise at trial, but that a conflict existed at that very moment at the conflict hearing. The Judge would have learned that Gallina never even talked to Holder about the case, nor had he even shown him a copy of the indictment, that Holder had never heard the tapes nor seen the transcript, that Gallina was going to personally represent Sisca, that Sisca was not at the conflict hearing, that Holder didn't understand what a conflict was, that Holder had been told what answers to give the Court.

After such a hearing, the Court must be satisfied of two things: "that no conflict exists and that the parties had no valid objection to joint representation." United States v. Mari, supra at 119. On its face, it was obvious that a conflict existed and, certainly, after any type of reasonable inquiry, this would have been apparent.

Mari, DeBerry and Alberti and recently, United States v. Carrigan, ___F. 2d. ___, Docket Nos. 74-2056, 74-2057 (2d Cir., November 3, 1976), reinforce the Judge's second responsibility to advise the defendant of the facts underlying the potential conflict and give the defendant the opportunity to express his or her views. Nowhere in the hearing minutes of November 27, 1972 did Judge Bryan ever advise Erroll Holder of the facts underlying the conflict. According to the Government's own memorandum below, at J.A. 66-68, all Judge Bryan did was to explain to each defendant that the charges were serious; that each had the right to his own lawyer, that "there is a possibility of a situation developing during the trial in which the best protection of your interests may be different from the protection of the interests of one or more of your co-defendants who is represented by the same counsel"

(Tr. 2). These were merely conclusory statements struggling for acceptance as a meaningful explanation of each defendant's predicament. At no time was Erroll Holder advised, as the cases require, of the facts which might lead to a conflict. There was no attempt to put in concrete terms that he could understand, the nature of the path on which he was embarking. He was not told, for instance, that the decision to take the stand might have to be evaluated in light of how much it would hurt someone else and not how it could help him. Holder did not know, as John Pollok did later, that based upon a factual analysis, he "felt it was wrong for the law firm to represent six defendants." (Tr. 25, May, 79-80).

Nor did Judge Bryan give Mr. Holder "the opportunity to express his views." The Appellant merely answered yes or no to the Court's questions. This can hardly be interpreted as the expression of his views. The thrust of the cases in this Circuit is that there should be some meaningful dialogue between the defendant and the Court in order for the Court to have some basis for evaluating that the defendant is making a knowledgeable answer. This does not mean the mere mouthing of the words, Boykin v. Alabama, 395 U.S. 238(1969), but a statement from the defendant indicating what he was told of the facts underlying the conflict and an indication of his understanding of the problem.

Here, there was no attempt to probe Holder as to his views. The Judge never got the essence of Holder's specific situation. He was not made aware by Holder if the defendant knew the facts because he didn't ask him. One wonders whether if the Government had not asked for the hearing, if Judge Bryan would have taken notice of any interest in the fact that one law firm was representing six different

defendants in a narcotics conspiracy case.

Interestingly, two suggestions, one by Mr. McDonald, and one by Gallina himself were ignored by the Judge. Gallina suggested that he absent himself from the courtroom. The could have had the salutory effect of creating some candor in the courtroom. Had this been coupled with a personal investigation of each defendant, not in earshot of any others, some light may have crept into the proceedings.

The other suggestion by the prosecutor was that the Court appoint independent counsel in the issue of conflict. The making of this suggestion, by itself, and its emphatic remaking later, should have been a loud signal to the Judge that the prosecution was seriously concerned with the candor of the information and advice the defendants were right then receiving. Clearly, the adoption of this suggestion would have been the most efficacious manner of proceeding and have uncovered for all to see the real situation. Why this was not done is perplexing. Apparently, Judge Bryan chose to rely on his instincts, rather than objective criteria.

To sum up, the hearing was not conducted in a manner to afford the Judge the opportunity to evaluate whether Holder was knowingly, intelligently and voluntarily waiving his right to be represented by his own lawyer. This raises, however, a second, perhaps more troubling problem for a Court. What if a defendant, no matter how vigorously advised by the Court, is unable to make an intelligent decision because his lawyer who is advising him is acting against his interests? Can or should a Court intervene to correct that situation when it becomes known? We submit it must.

Erroll Holder deserves the protection of the Court just as every other person who comes before it. When Judge Bonsal became

aware that Holder's rights to a fair trial were violated, he had the duty to reverse the conviction and order a new trial. Subsequent to the "DeBerry" hearing, events bore out that Holder was receiving advice from his lawyer that was inconsistent with his interests. This inconsistency manifested itself most dramatically in the failure of his lawyer to make a timely motion to suppress the most damaging piece of evidence against him. How can we hold Holder responsible for that? How can we hold him responsible for being in the dark about his lawyer's malfeasance toward him? He trusted his lawyer, not knowing any better, and got "sold out". His lawyer, not giving Holder any information about the case, nor apprising him of his true intentions, to protect Sisca alone even if it hurt Holder, advised the Appellant to waive his right to conflict-free representation. Are we to expect a layman like Holder to see through all of this and have Gallina relieved? "It would be a rare defendant who could intelligently decide whether his interests will be properly served by counsel who also represents another defendant." United States v. Carrigan, supra at 498 (Lumbard, J., concurring).

Where it is demonstrated that a lawyer is acting against his client's interests, and, indeed, is acting wilfully to hurt him in order to help another, the burden no longer rests upon the shoulders of the defendant to bear every day he is in prison. This happened to Erroll Holder. Gallina's representation of him amounted to a nullity. The decisions that were made in the case were not the products of full conferences with Holder with an eye toward presenting his most effective defense. The decisions that were made were without the participation of Holder and against his position. In that situation, only the Court can help him.

This is an all too frequent occurrence considering the glut of multi-defendant cases with which the District Courts have more frequently been confronted. Judges must be extremely sensitive not only to the more casual conflict, problems inherent in any multi-representation, but must have a finely tuned antenna to pick up the more dangerous wilful conflicts sometimes fomented by defense attorneys who are unable to renounce a particular allegiance. Where this is evident, the Court must act on its own, in spite of a defendant's perfunctory acceptance of the lawyer. In this regard we agree wholeheartedly with Judge Lumbard:

> It has become increasingly clear that the only way to ensure adequate representation for each defendant in a multi-defendant case is the initiative of the Court to require separate counsel as soon as the Court is aware of the situation. The adoption of a rule by each District Court, or by action of the Court of Appeals for the Circuit, would solve the problem. United States v. Carrigan, supra, at 398.

Recognizing the absence of such a rule and, perhaps, its future availability, Judge Lumbard indicated that the District Judges must be vigilant to avoid the necessity of multiple trials when the conflict manifests itself in substantial prejudice.

> It follows that there will be cases where the court should require separate counsel to represent certain defendants despite the expressed wishes of such defendants. Indeed, failure of the trial court to require separate representation may, in cases such as this, require a new trial, even though the defendants have expressed a desire to continue with the same counsel. The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administration of criminal justice that it must in some cases take precedence over all other considerations, including

> the expressed preference of the defendants concerned and their attorney."
> United States v. Carrigan, supra at 399

The present case is the most extreme example of this problem. It would be a gross understatement to conclude that Gallina's loyalty here was divided. That would suggest that he possessed some amount of loyalty to Holder. The fact of the matter is that he owed all his loyalty to Sisca, that he had no interest in Holder, and, in fact, was willing to work against Holder if that would help Sisca.

Under these circumstances, can it really be said that Erroll Holder had any knowledge of the case against him, and, consequently, was in an intelligent position to make a voluntary waiver? Can Erroll Holder, a criminal defendant in a world of lawyers, be expected to realize when his very own attorney is working against him? These questions, when answered in the negative, as they must be, require this Court to vacate the conviction because of the failure of the Appellant to have had the effective assistance of counsel, regardless of what Judge Bryan did or might have done to decide whether the waiver was validly executed.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE ORDER DENYING APPELLANT'S MOTION UNDER 28 U.S.C. § 2255 SHOULD BE REVERSED, THE JUDGMENT OF CONVICTION VACATED, AND THE CASE REMANDED FOR A NEW TRIAL.

Respectfully submitted,

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PETITION TO VACATE SENTENCE PURSUANT TO TITLE 28 U.S.C. §2255

IN THE UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

70 CIV. 1424

ERROLL HOLDER,

Petitioner

-vs-

UNITED STATES OF AMERICA,

Respondent

72 CR. 1159

PETITION

PETITION TO VACATE SENTENCE

PURSUANT TO TITLE 28 U.S.C. §2255

Comes now, ERROLL HOLDER, who, by his attorney, ALVIN GELLER, and upon Petitioner's attached affidavits, respectfully prays your Honorable Court to enter an Order Vacating the Judgment of Sentence and granting him a new trial and/or discharge from his present restraint of liberty on the following grounds:

1. That Petitioner is a citizen of the United States of America.

2. That Petitioner is now illegally confined in the Federal Penitentiary, Lewisburg, Pennsylvania, P.O. Box 1000.

PETITION TO VACATE SENTENCE PURSUANT TO TITLE 28 U.S.C. §2255

3. That said illegal confinement is pursuant to a sentence of (Aggregate) of Twelve (12) years imprisonment on Counts One (1) and Three (3) of Criminal Indictment Number 1159-72 with a Special Parole of Four (4) years to follow pursuant to Title 21 U.S.C. Section 841 (3)(1)(a) (e) and Section 843(b).

4. That Count one of said indictment charged Movant with conspiracy to distribute controlled substance, (Heroin). Count three of said indictment charged Movant with using a communication facility during commission of conspiracy.

5. That Movant was tried by Jury together with Six (6) co-defendants before the Honorable Frederick Van Pelt Bryan from January 16, 1973 to February 23, 1973, and found guilty. Judge Bryan ultimately reduced the original sentence of 15 years (Count 1) and consecutive 4 years (Count 3) with 5 years Special Parole to the above described aggregate sentence of 12 years imprisonment with 4 years to follow on Special Parole.

6. That a direct appeal was filed and denied on May 10, 1974 in a published opinion by the United States Court of Appeals for the Second Circuit (Nos. 73-2185). United States v. Sisca, et. al., 503 F. 2d 1337 (2d Cir., 1974). The Supreme Court of the United States denied petition for Writ of Certiorari on November 11, 1974.

7. That Movant is being held in Federal custody unlaw-

fully because he was deprived of his rights under the Sixth and Fourteenth Amendments to the United States Constitution to competent representation by Defense Counsel free of conflict of interest.

8. That on October 30, 1972, Attorney Jeffrey M. Hoffman of the Firm of Lenefsky, Gallina, Mass, Berne and Hoffman filed notice of appearance on behalf of Movant and co-defendants Sisca, Abraham, Grant, Hoke and Logan and thereupon stated to the Court:

> "By Judge Weinfeld:
>
> Q. Mr. Hoffman, I take it that you have discussed whether or not there is any conflict of interest in your firm's representation of a number of defendants here?
>
> .By Jeffrey M. Hoffman:
>
> A. That's correct your Honor. At the present time, having spoken to them, in the posture they are in at the present time, I find no conflict of interest."

9. That also, on October 30, 1972, Attorney Lawrence Greenberg of Legal Aid Society was appointed to represent co-defendant Laverne McBride. But previously, Attorney Murray Addie also of the same Legal Aid Society had been appointed to represent co-defendant Leonard Ellington in this case. Thus, new Defense Counsel not of said Legal Aid

Society was subsequently substituted for co-defendant because conflict of interest arising from such mutual representation of McBride and Ellington had been detected. Moreover, the Legal Aid Society requested that other Defense Counsel be appointed for McBride also. And, on November 9, 1972 Attorney Gilbert Epstein was substituted as appointed Counsel for McBride. In accord with the rights of McBride and Ellington, the Walker test of possible conflict of interest and prejudice however remote was applied by said Legal Aid Society and Judge Edward Weinfeld; See: Walker vs. United States, 422 F2d. 374 (3rd Cir. 1970): U.S.A. ex rel. Hart vs. Davenport, 478 F2d. 203 (1973).

> " Normal competency includes, we think, such adherence to ethical standards with respect to avoidance of conflicting interests as is generally expected from the bar."

10. That, but for the above quoted statement to Judge Weinfeld by Attorney Jeffrey M. Hoffman, your instant Movant's rights to competent representation by Defense Counsel free of any possible conflict of interest might also have been safeguarded by the Court - but, also on October 30, 1972, Judge Weinfeld assigned Movant's case to the Honorable Frederick Van Pelt Bryan for hearing of pre-trial motions and trial.

11. That, on November 17, 1972 the Government moved to safeguard Movant and co-defendants Sisca, Abraham, Grant

Hoke and Logan's rights to competent representation free of conflict of interest by filing motion that defendants be ordered to retain separate Defense Counsel not of one and the same law firm, notice of motion for order resolving conflict of interest and an affidavit by, Assistant United States Attorney, in support of Government's Motion to resolve conflict of interest.

12. That, on November 22, 1972 Judge Bryan held a hearing on the Government's above described Motion.

(a). At said hearing, Judge Bryan failed to explain what conflict of interest was, or could be, to Movant - while no attorney in any of the Law Firm of Lenefsky, Gallina, Mass Berne, and Hoffman had ever given Movant any explanation of what conflict of interest was and could be.

(b). At said hearing Attorney Gino Gallina, spoke for his entire law firm in opposition to the Government's Motion for Order requiring Counsel outside of Mr. Gallina's firm to be retained by Movant and all of Mr. Gallina's statements primarily related to his firm's desire to represent co-defendant Abraham (N.T. of 11-22-72 pg. 14, 15, 16, 17, 18, 19, 20, 21, and 22), parts of which were not true statements and the remaining parts not having anything to do with Movant, Sisca, Grant, Hoke or Logan at all.

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(c). At said hearing, Judge Bryan ignored the Government's efforts to safeguard Movant against incompetent representation due to conflict of interest and commenced to question Movant and each co-defendant on the basis of the above described mis-leading statements by Attorney Gallina-not allowing the Government's request to have independent legal advice given to Movant by Counsel not associated with the Law Firm of Lenefsky, Gallina, Mass, Berne and Hoffman, as to exactly what conflict of interest is and could be for Movant alone at a Jury Trial.

(d). At said hearing, by not allowing Movant aid of Counsel not of the Law Firm of Lenefsky, Gallina, Mass, Berne and Hoffman, caused and thereby created a conflict of interest and unlawfully found waiver of a known Constitutional Right where there was no such waiver or intelligent selection by Movant and thus, in turn, based the Court's denial of Government's entire motion on entirely unconstitutional foundations out of no actual findings of fact at all.

(e). At said hearing on November 22, 1972 Judge Bryan also based the Court's decision to allow Movant to ignorantly suffer the possible and probable consequences of incompetent representation due to conflict of interest of Defense Counsel by citing a case authority which was not factually or legally applicable to Movant's particualr situation in Judge Bryan's Court (N.T. of 11-22-72, pg. 41), to wit:

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> " The Court:
>
> As I read United States vs. Shinen, (sic) Sheiner, there the conviction was upheld on a waiver practically the same as the one we are conducting this morning, if it could be called a waiver. I would call it an election rather than a waiver, a specific, deliberate election on the part of these defendants. I do not see, Mr. McDonald, that at this point any further inquiries are necessary. It seems to me quite clear these defendants in view of the extensive discussion of the possibilities this morning and in view of---."

(f). The entire record of Judge Bryan's hearing on November 22, 1972, clearly shows that there was no "extensive discussion of the possibilities" of prejudice and incompetent representation due to conflict of interest, with Movant or in Movant's presence at said hearing or with any attorney who was not associated with Counsel of the Law Firm that was already in conflict with Movant's and other co-defendants' interests.

13. That the above described hearing on November 22, 1972 as conducted by Judge Frederick Van Pelt Bryan, was not full and fair and, that at said hearing and at all the subsequent pre-trial motion hearings and Jury Trial, Movant suffered the unconstitutional results of incompetent representation by Counsel due to conflict of interest.

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14. That, on November 22, 1972 Judge Bryan made no adequate or impartial inquiry at all to either ascertian that no conflicts of interest existed or would be likely to result at further pre-trial motions and trial, actually conceded that, conflict of interest would result if said Law Firm continued to jointly represent Sisca, Abraham, Grant, Movant Hoke and Logan at the same trial on the same indictment and failed to establish (as to Movant) any intelligent waiver of a known Constitutional Right.

See: United States vs. Williams, 429 F2d. 158, 161 (8th Cir. 1970); Government of Virgin Islands vs. Johns, 447 F2d. 69. 74 (3d Cir. 1971); Commonwealth ex rel. Whitling vs. Russell, 406 Pa. 45. 176 A.2d. 641.

15. That the Government's case against each of the six defendants jointly represented by one law firm governed and controlled by one Attorney in Gino Gallina disclosed accusation of a "chain" conspiracy as commonly charged in narcotics cases and Judge Bryan's subsequent denial of defense motion for severance on co-defendant Sisca's behalf alone caused commonly shared law firm attorneys to deprive Movant of his rights to take the witness stand and testify in his own defense at trial by jury - because of the same jointly shared law firm's inability, to examine Movant or any co-defendant at the same trial

on the same indictment. See: United States vs. Pine, 452 F2d. 507 (5th Cir. 1971).

(a). At the expense of the rights of Movant, Attorney Gino Gallina apparently instructed all other attorneys of the same firm (Lenfsky, Gallina, Mass,Berne and Hoffman) to neglect to file timely pre-trial motions for severance and separate trial on Movant's behalf-while said attorney did file motion for severance on behalf of co-defendant, Sisca, alone.

(b). At the expense of the rights of Movant, Attorney Gino Gallina apparently instructed all other attorneys of the same firm (Lenefsky, Gallina, Mass,Berne and Hoffman) to neglect to file timely pre-trial motion for suppression of wiretap evidence on grounds of lack of minimization on Movant's behalf even when instructed to do so by the Court-while said Attorney (Mr. Gallina) and all other attorneys of said firm knew that wire-tap evidence was the only evidence the government alleged to have against Movant (See: Hearing of Severance Motion of December 27, 1972) and while the entire firm of Lenfsky, Gallina, Mass, Berne and Hoffman was aware that it was then perfecting a defense for co-defendant Alphonse Sisca alone which would include presentation of proofs that Sisca's voice was not on any tape evidence and that Sisca alone would present an alibi defense. Thus, the existence and results of conflict of interest was apparent prior to trial, during trial, and

throughout direct appeal into the Supreme Court of the United States which denied Certiorari.

(e). The entire record shows that the Firm of Lenefsky, Gallina, Mass, Berne and Hoffman, were judicially given from December 27, 1972 until January 18, 1973 to file all pre-trial motions on Movant's behalf for suppression of Wire Tap Evidence for lack of minimization, as well as for lack of following directives of State and Federal Law by police, for not following the directives in the warrants as to some of the tapes by police and for lack of any legal authorization at all - as to tapes taken by police on dates prior to dates mentioned in the warrants obtained. Counsel's failure to timely raise such available pre-trial defense (together) on Movant's behalf shows incompetent representation due to conflict of interest. See: United States vs. Ash. 413, U.S. 300 93 S.Ct. 2568, 37 L.Ed. 2d 619 (1973). Quoting: United States vs. Bennett, 409 F2d 888 (2nd Cir. 1960).

(d). A timely motion on lack of minimization of wiretap evidence should have been filed together with all other motions that were timely filed-because the facts in favor of one would have shed favorable light on the other-when it can now be said that the doctrine of minimization and defense remedies to violations of same existed in the legal heads of counsel long before the trial date of this case.

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16. That the record clearly indicates that controlling defense counsel Gino Gallina filed a motion for severance (separate trial) for co-defendant Sisca alone-while holding his other assiciate law firm Attorneys Hoffman and Pollock from filing motions for severance on behalf of Movant and other co-defendants, because Mr. Gallina believed the Court would grant his motion for Sisca alone. Therefore, Movant and other co-defendants were prejudiced from the inception of Mr. Gallina's action and by said inaction by Mr. Hoffman and Mr. Pollock where Counsel was thus barred from allowing co-defendants Abrahams to testify at the trial in his own defense and in denial of Government trial accusation that he had informed on himself and others at the time of his arrest.

(a). By the prejudicial inaction of Mr. Gallina's entire Law Firm prior to trial said firm was barred from leaving co-defendant Abrahams open to cross-examination by the Government-on t' e alleged post-arrest interrogations by Agents Harris, Albert and other agents (N.T. 286, 287,288, 289, 290, 292, 293, 294 of Vols. 1 and 2) of co-defendant Abrahams.

(b). Attorney Hoffman merely cried out at the pain of restraint that Mr. Gallina had shackled all co-counsel with by belatedly requesting the Court to subpoena all Government Agents that Agent Harris had testified where present during the post-arrest interrogations of co-defendant Abrahams (N.T. 295 Vol 1),

and the Court told Mr. Hoffman to go ahead and subpoena. Mr. Hoffman answered: "Thank You", to the Court and thereafter did not in any manner move to issue the requested subpoenas at any time. This inaction is just one of the many recorded proofs that Movant's Jury Trial was made a sham and a mockery of Justice by incompetent representation by defense counsel due to conflict of interest.

(c). The Government agent allegations of multiple post-arrest interrogations, meetings (after release on bail) and attempted meetings with co-defendant Abrahams (N.T. 293, 294 etc, Vol. 1) became so prejudicial to all defendants on trial before the same jury that another co-defendant's Counsel nor of or related to the Law Firm of Lenefsky, Gallina, Mass, Berne and Hoffman- a Mr. Epstein, made a blanket trial motion on behalf of all defendants against the joinder of said defendants for such trial- asking that such prejudicial proceedings be judicially stopped- citing the case of United States vs. Mele, 462 F2d. 918 (2d Cir. June 15, 1972) as authority for grant of a mistrial, which the Court denied.

(d). The record further shows that Attorneys Gallina, Hoffman and Pollock did not join Mr. Epstein in the above described most relevant motion for mistrial on good cited authority of Mele.

See: Also United States vs. Rispo, 460 F2d. 965, 970(3d Cir.

1972).

17. That the representation of multiple defendants, as to successive stages in an alleged Narcotics Distribution Chain, without any intelligent knowing and free of conflict of waivers, represents a conflict of interest as a matter of Law.

(a). The entire proceeding by Judge Frederick Van Pelt Bryan on November 22, 1972 was totally inadequate and unlawful where attorneys Jeffrey Hoffman, John Pollock, et al,, were absent thereform, did not and could not speak therein for themselves or for Movant and co-defendants other than co-defendant Alphonse Sisca. At all pre-trial Motions, hearings, and at Trial and even at said proceedings of November 22, 1972, it was apparent that Attorney Gino Gallina and his entire Law Firm could not competently or effectively coordinate the defense and possible defenses of six (6) different defendants-thus, on said date, the Court did not hear Mr. Gallina alone and decide the issue of possible conflict of interest in accord with Law and the Constitutional Rights of Movant or any other co-defendant in this case.

(b). Courts have held and this Honorable Court should hold that upon a showing of a possible conflict of interest and/or prejudice however remote, joint representation will be regarded as Constitutionally defective.

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See: United States ex rel. Hart vs. Davenport, 478 F2d. 203 (1973); United States ex rel. Small vs. Rundle, Warden, 442 F2d. 110 (2nd Cir. 1957); Glasser vs. United States, 315 U.S. 60 (1942) and A.B.A. Standards Function pp. 213, in relevant parts:

> " The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigations, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation."

(e). In the year 1942, the Glasser Court (315 U.S. 60), had long before advised and mandated the Judge Bryan in this case:

> "...irrespective of any conflict of interest the additional burden of representing another party may conceivable impair counsel's effectiveness. The right to have the assistance of Counsel is the fundamental and too absolute to allow Courts to indulge in nice calculations as to the amount of prejudice arising from it's denial."

18. That in its opinion affirming the judgment of conviction in this case, the Second Circuit held that there had been an afformative waiver of the claim of lack of minimization in a twenty-four hour, round-the-clock, daily, automatic telephone electronic surveillance, and that trial counsel had, "elected to pursue a trial strategy of intentional relinquishment of a known right and the deliberate by-pass of the orderly and timely

suppression procedure provided by Section 2518 (19)(a)" United States v. Sisca, et.al., 503 F2d 1337, 1349 (2d Cir., 1974). The Circuit held further that in this case, "The evidence derived largely from wiretaps and their fruits..." (Id at 3416), but that counsel had ignored the trial judge's directive to make the mimimization claim, of which they were aware, prior to trial (Id at 1349)

> Appellants knew of the alleged failure to minimize at least three weeks prior to trial. Indeed they themselves brought to the attention of the Court the facts upon which such a motion could have been made had their trial strategy called for it. (Id at 1347, emphasis supplied)
>
> When the deliberate trial strategy of defense counsel is to obtain such a ruling only during or after trial, this flexibility is lost. (Id at 1348, emphasis supplied)

Thus, the Circuit recognized that trial counsel deliberately failed to raise a substantively valid Fourth Amendment claim that might well have resulted in the suppression of the entire case against Movant and that counsel did this as a matter of deliberate trial strategy. That strategy, Movant submits could only have been, as shown above, for the benefit and protection of Alfonse Sisca, at the expense of Movant, both of whom counsel continued to represent despite the gross conflict of interest.

19. That upon a timely motion made in the New York State case

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(Westchester County) Holder v. New York, the same wiretap evidence was suppressed on the grounds of lack of minimization. Movant was thereon represented by the same trial counsel who failed to make the timely motion in the federal case due to the above described conflict of interest.

20. That Section 2255 of Title 28 U.S.C. requires that a District Court "promptly" issue show Cause and/or conduct an Evidentiary Hearing and/or make findings of fact and conclusions of law, unless the records of the case conclusively show the allegations presented are untrue. The record and all law as cited herein fully support the grant of this Motion to Vacate Sentence.

WHEREFORE:

On the basis of the separate and cummulative facts as herein-above set forth, Movant prays that his sentence be vacated and that he be granted a new trial and/or be discharged (released) from illegal restraint of his liberty.

Respectfully submitted,

ALVIN GELLER
Attorney for Movant
299 Broadway
New York, New York 10007
(212) 233-3330

PETITION TO VACATE SENTENCE PURSUANT TO TITLE 28 U.S.C. §2255

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA)
) ss:
COUNTY OF UNION)

I, ERROLL HOLDER, hereby depose and swear that the facts set forth in the foregoing Motion to Vacate Sentence pursuant to Title 28 U.S.C. Section 2255 are true and correct to the best of my knowledge, information and belief.

_____

ERROLL HOLDER, Movant

SWORN TO AND SUBSCRIBED BEFORE ME THIS ___ DAY OF _____, 1976.

UNITED STATES PAROLE OFFICER_____.

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

ALVIN GELLER, being duly sworn, deposes and says, that he is the attorney retained by Movant to represent him in his application to the United States District Court for the Southern District of New York for a vacatur of his sentence and for a new trial or release from custody, pursuant to 28 U.S.C. §2255, and that he has subscribed to the foregoing motion and does state that the information therein is true and correct to the best of his knowledge and belief.

_____

Subscribed and Sworn to before me
this day of March, 1976

ALVIN GELLER

AFFIDAVIT OF ERROLL HOLDER, PETITIONER, FOR VACATUR OF SENTENCE PURSUANT TO 28 U.S.C. §2255

IN THE UNTIED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

ERROLL HOLDER, Affiant, -vs- UNITED STATES OF AMERICA	72 CR. 1159 AFFIDAVIT FOR VACATUR OF SENTENCE PURSUANT TO 28 U.S.C. §2255

STATE OF NEW YORK)
(SS:
COUNTY OF MANHATTAN)

TO: THE HONORABLE PRESIDING JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

I, ERROLL HOLDER, hereby adopt and swear to the events set out in the above attached motion and to the following events and that they did happen (as described herein) at and in a pre-hearing meeting with Attorney Gino Gallina at the office of the Law Firm of Lenefsky, Gallina, Mass, Berne and Hoffman - located in New York City, New York - immediately prior to my appearance before Honorable Frederick Van Pelt Bryan of the United States District Court for the Southern District of New York on November 22, 1972, to wit:

1. Prior to November 22, 1972, I was notified by Attorney Gino Gallina that a pre-hearing conference would be held at the

AFFIDAVIT OF ERROLL HOLDER, PETITIONER, FOR VACATUR OF SENTENCE PURSUANT TO 28 U.S.C. §2255

law office of Lenefsky, Gallina, Mass, Berne and Hoffman.

2. On November 22, 1972, I did personally appear at said law office for such conference - together with co-defendants Walter Grant, Robert Hoke, Willie Abraham, et al.

3. On November 22, 1972, Attorney Gino Gallina was a member of the Law Firm of Lenefsky, Gallina, Mass, Berne and Hoffman located in New York, New York.

4. On November 22, 1972, only the above named were present at said pre-hearing conference with me in Gino Gallina's office. Co-defendant Alphonse Sisca was not present at said conference.

5. On November 22, 1972, Associate Counsels Pollock, Hoffman, et al., were not present at said pre-hearing conference and same was held by Attorney Gino Gallina alone.

6. Attorney Gino Gallina was represent co-defendant Alphonse Sisca; not me, nor any other co-defendant than Mr. Sisca.

7. At no time prior to, on, or after November 22, 1972, was I ever afforded an opportunity to read and/or personally examine any written motion that had been filed by the Government. At no time did Attorney Gino Gallina read any written Motion to me or to any other co-defendant in my presence.

8. At no time did Attorney Gino Gallina explain to me what conflict of interest was or how ineffective and/or incompetent defense representation could result therefrom.

AFFIDAVIT OF ERROLL HOLDER, PETITIONER, FOR VACATUR OF SENTENCE PURSUANT TO 28 U.S.C. §2255

9. Prior to, on, and after November 22, 1972, I had no personal knowledge whatsoever of what conflict of interest was, and had no personal knowledge of what ineffective and/or incompetent representation by Defense Counsel was, and had no knowledge of the possible harm that same could bring against me in a criminal case.

10. On November 22, 1972, Attorney Gino Gallina (at his office) advised me that Government Prosecuting Attorneys had asked Judge Frederick Van Pelt Bryan to bar the law firm of Lenefsky, Gallina, Mass, Berne and Hoffman from representing five (5) defendants in my case. The reason Attorney Gino Gallina gave to me and co-defendants Abraham, Grant, Hoke, Logan, et al (in the absence of Sisca on November 22, 1972) for said Government request was the Government Prosecution was plotting against me and my co-defendants who were present at said conference by reason of the fact (as Mr. Gallina stated it) that the Government would have an unfair advantage over and thereby easily convict me and all other co-defendants in each co-defendant and I retained defense attorneys not of the law firm of Lenefsky, Gallina, Mass, Berne and Hoffman.

11. On November 22, 1972, at said pre-hearing conference, the above described advise by Attorney Gallina instilled fear in me that I would be easily convicted and sentenced to lenghty

imprisonment, lose all appeals, etc., if I accepted any offer or retainer of defense counsel from any attorney other than of the law firm of Lenefsky, Gallina, Mass, Berne and Hoffman.

12. Therefore, I (prior to on November 22, 1972) did not personally understand the legal or Constitutional significance of the facts as set forth herein and only gained such awareness upon retaining my present attorney.

Personally appeared before me this day of , 1976, (affiant), who being duly sworn, stated that the foregoing facts are true and correct to the best of his knowledge, information and belief.

This, the day of , 1976.

_____
ERROLL HOLDER - Affiant

SWORN TO AND SUBSCRIBED BEFORE ME THIS ____ DAY OF _____, 1976.

NOTARY PUBLIC _____.

MEMORANDUM OF LAW IN SUPPORT OF MOTION AND AFFIDAVIT
PURSUANT TO TITLE 28 U.S.C. §2255
IN THE UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

ERROLL HOLDER, Movant -vs- UNITED STATES OF AMERICA, Respondent	72 CR. 1159

MEMORANDUM OF LAW IN SUPPORT

OF MOTION AND AFFIDAVIT

PURSUANT TO TITLE 28 U.S.C. §2255

ALVIN GELLER
Attorney for Movant
299 Broadway
New York, N.Y. 10007
(212) 233-3330

MEMORANDUM OF LAW IN SUPPORT OF MOTION AND AFFIDAVIT PURSUANT TO TITLE 28 U.S.C. §2255

STATEMENT OF FACTS

A number of defendants were indicted for various drug offenses. The Law firm of Lenefsky, Gallina, Mass, Berne and Hoffman filed motions of appearance on behalf of six co-defendants. Prior to trial, the Government informed the trial Judge that the evidence would disclose a "chain" conspiracy, common in narcotics cases, and that a possible conflict of interest could arise by having one law firm represent six co-defendants.

The Government filed a motion to resolve this apparent conflict of interest, and the trial Judge conducted a pre-trial hearing on the matter. At the hearing, Attorney Gallina urged the Court to allow his firm to remain as Counsel for all co-defendants. In open Court, the trial Judge asked the defendants individually whether they understood that a possible conflict of interest might arise by having the same firm represent six co-defendants. Each defendant assured the trial Judge that despite any possible conflict, he wished to be represented by the Gallina firm. The Judge did not specify how a conflict might arise. Nor did he conduct <u>in camera</u> proceedings or appoint different counsel with whom the defendants could discuss any possible conflict. The Court allowed the Gallina firm to remain as counsel for all six co-defendants.

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At trial, certian wiretaps were introduced which tended to incriminate five of the co-defendants, but which tended to exonerate the sixth co-defendant, who was alleged "Kingpin" in the conspiracy. At no time before trial did attorneys for any of six co-defendants move to suppress wiretaps.

The five co-defendant, who were implicated by the contents of the wiretaps, were convicted of various narcotics offenses. Erroll Holder, one of the five who was convicted, was sentenced to prison for violations of 21 U.S.C.A. Section 841. Following the trial, counsel for the co-defendants moved to suppress wiretap evidence. The Court would not entertain these motions on the ground that they whould have been filed prior to trial.

The defendant, Holder, now moves to vacate sentence pursuant to 22. U.S.C.A. Section 2255 on the basis that his Sixth Amendment Rights were abridged.

ARGUMENT

THE DEFENDANT HOLDER WAS DENIED HIS SIXTH AMENDMENT RIGHT OF EFFECTIVE ASSISTANCE OF COUNSEL.

The question of when a convicted defendant has been denied his Sixth Amendment Rights, resulting from a conflict of interest of trial Counsel, has been the subject of much recent treatment

in the Second Circuit of Appeals. The starting point for a discussion of this issue is the case of Morgan vs. United States, 396 F2d. 110 (2d Cir. 1968). In Morgan, the defendants were convicted of violating the Mann Act. Prior to trial, counsel for the defendant, Morgan, withdrew from the case, and the trial judge appointed the attorney for Stein, Morgan's co-defendant, to represent Morgan. A conflict arose between the positions of Stein and Morgan, and Stein was not cross-examined on Morgan's behalf.

Morgan asked that his sentence be vacated, and filed a Section 2255 proceeding, alleging denial of Sixth Amendment Rights, In remanding the proceedings, the Court stated:

> "Despite what the appearance may be before trial, the possibility of a conflict of interest between two defendants is almost always present to some degree even if it be only in such a minor matter as the manner in which their defense is presented."
>
> 396 F2d. at 114

Accordingly, the Court suggested that, where a potential conflict of interest might arise from a joint representation situation, the trial Court should determine, through "careful inquiry", whether prejudice will result from the joint representation. The Court felt that the trial Judge was in the position

to make inquiry, "both public and private", as may be necessary to determine if a conflict would arise.

Subsequently, in United States vs. Lovano, 420 F2d. 769 (2d Cir. 1970), cert. denied, 397 U.S. 1071 (1970), the Court further specified what would be required for a reversal of conviction on Sixth Amendment grounds resulting from a conflict of interest. The Court set forth the Second Circuit rule:

> "The rule in this Circuit is that some specified instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel."
>
> 420 F2d, at 773

See also: United States vs. Badalamente, 507 F2d, 12 (2d Cir. 1974) cert, denied, 95 S.Ct. 1565 (1975).

Thus, the rule in the Second Circuit is that some specific showing of prejudice must be shwon to overturn a conviction on the conflict of interest ground. The Lavano rule has remained viable in the Second Circuit, and most of the recent litigation on the conflict issue has been concerned with the sufficiency of the pre-trial inquiry by the trial Judge in relation to the Lovano standard.

Here, the defendant, Holder, has suffered a specific prejudice through the failure of his counsel to move that in-

criminating wiretap evidence be suppressed. The question then arises as to whether the pre-trial inquiry was effective so as to alert Holder of the possibility of this prejudice, thereby casting serious doubt on his post-trial claim.

Even before the Lovano standard of "specific prejudice" was enunciated, the Court had made inquiry into the issue of the sufficiency of the pre-trial hearing. In United States vs. Sheiner, 410 F2d. 337 (2d Cir. 1969) cert. denied, 396 U.S. 825 (1969) cert. denied sub nom., U.S. vs. Piacentile, 396 U.S. 859 (1969), rehearing denied, 412 U.S. 944 (1973), the defendants were convicted of mail fraud and conspiracy offenses relating to the fraudulent sale of altered pennies. On the second day of trial, the trial Judge informed the two defendants who were represented by the same counsel that the Government's evidence tended to show that the defendant Sheiner was the "outlet" for coins provided by the defendant, Piacentile. The Court noted that this might present a conflict and asked the defendants to consider whether they wished to continue being represented by same counsel. On the next day, after the defendant Sheiner had conferred with another attorney, he informed the trial Judge that he did not wish to change his attorney.

After Sheiner was convicted, he appealed on Sixth Amendment grounds. The Court citing Glasser vs. United States, 315 U.S. 60 (1942), noted the importance of representation free from

conflicting interests. As to the defendant Sheiner, however, the Court remarked:

> "We think that the evidence in this case shows that Sheiner was clearly informed of the possibility of prejudice from sharing Piacentile's counsel but that he freely made a considered choice to continue Mr. Siegal's joint representation. The Court was scrupulous in alerting Sheiner and his counsel to the danger of conflicting interests and in specifically ascertaining that Sheiner had discussed the question with Counsel, considered it and decided to proceed with Siegal."
>
> 410 F2d. at 342

The record in the present case reveals that the trial Judge, relying on Sheiner, insisted that the pre-trial hearing was sufficient to dispose of the conflict of interest issue. Upon closer examination, however, it is clear that Sheiner is distinguishable on at least two basis. First, unlike the defendant here, Sheiner was advised by the trial Judge as to how his position would conflict with that of his co-defendant. Secondly, Sheiner had the opportunity to consult with outside counsel on the conflict matter.

The Court had the opportunity to expand on the sufficiency of hearing issue in United States vs. Alberti, 470 F2d 878 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973). In rejecting the

defendant's Sixth Amendment claim, the Court commented upon the proper course for the trial Judge to take when a potential conflict of interest became apparent:

> "In such circumstances, the District Judge should conduct a hearing to determine whether there exists a conflict of interest with regard to defendant's counsel such that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment. In addition, the trial Judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given the opportunity to express his or her views. Such a procedure by the district court would reduce the possibility that this Court would feel obliged to reverse a conviction and order a new trial because defendant's counsel was inhibited by a conflict of interest."
>
> (emphasis added)
>
> 470 F2d. at 881-82

The holding in Alberti seems to venture further that Sheiner on the issue of the importance of the defendant's understanding of the nature of the conflict. A procedure such as that employed in the present case, which does not purport to instruct the defendants as to the manner in which the conflict might arise, is clearly insufficient in light of Alberti.

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The trial Judge made no effort to determine if the defendants were fully advised of the facts underlying the conflict.

In United States vs. DeBerry, 487 F2d. 448 (2d Cir. 1973), the Court adopted a significant new rule in Sixth Amendment conflict of interest cases. In DeBerry, two defendants, convicted of drug offenses, who were represented by the same attorney appealed on the Sixth Amendment conflict ground. The Court pointed out that, although counsel for the co-defendants assured the trial Judge that he had explained the conflict issue to the defendants, this was insufficient inquiry. The Court, citing United States vs. Foster, 469 F2d. 1 (1st Cir. 1972), adopted the rule that, where the inquiry of the trial Judge is insufficient the burden on the question of prejudice is shifted to the Government. (DeBerry, supra at 453, n.6)

While the trial Court in DeBerry apparently did not question the defendants at all, relying instead on the counsel's assurance, the fact that the trial Judge did not question the defendants here should not remove this case from the DeBerry rule. The effect of an inadequate inquiry is the same as that resulting from non-inquiry at all.

Hence, the teaching of DeBerry is that the Government here has the burden of proof of showing that no prejudice resulted to the Defendant Holder from the joint representation by the Gallina firm.

MEMORANDUM OF LAW IN SUPPORT OF MOTION AND AFFIDAVIT PURSUANT TO TITLE 28 U.S.C. §2255

The progression of Sixth Amendment conflict cases in the Second Circuit, which are relevant here, ends with United States vs. Vowteras, 500 F2d. 1210 (2d Cir. 1974), cert. denied, 419 U.S. 1069 (1975).

In the Vowteras case, the Court clarified its position as to the role of the pre-trial hearing. It will be recalled that in Alberti, supra, the Court indicated that the pre-trial hearing would serve to reduce the possibility of the convictions being reversed on appeal. The mere fact that a pre-trial is held on the conflict issue will not necessarily be conclusive on the Sixth Amendment issue. Similarly, in Vowteras, the Court stated that, since the defendants were fully advised of the underlying facts of the potential conflict, they could not, on appeal, repudiate their choice of counsel, absent specific showing of prejudice. The clear import of Alberti and Vowteras is that, even where the defendants are fully advised, a specific showing of prejudice can defeat the conviction. It seems, than, that the role of the pre-trial hearing is simply to mitigate the possibility of resulting prejudice. If prejudice is shown, a conviction may be reversed, notwithstanding a sufficient pre-trial hearing.

An overview of the Second Circuit cases results in the formulation of certain rules which pertain to Sixth Amendment conflict cases.

First, the defendant must point to a specific prejucicial occurance in order to prevail on appeal. A sufficient pre-trial

hearing during which the defendant is fully advised of the facts underlying the potential conflict will bear heavily against a bona fide showing of prejudice. If a pre-trial hearing which amounts only to an insufficient inquiry is afforded, the burden of showing no prejudice will be on the Government.

Turning to the present case, then, the first hurdle which confronts the defendant is the point to a specific instance of prejudices resulting from the joint representation of the Gallina firm. Such a showing of prejudice is apparent from the record. The Gallina firm neglected to file motions to suppress the wire-taps until after the trial had concluded. The circumstances of this case lead to one other conclusion, but that the failure to make these motions was for the sole reason that the wiretap evidence did not implicate Sisca, the alleged leader of the conspiracy. Thus, this prejudice was the direct result of joint representation which abridged Sixth Amendment Rights.

The case of United States ex rel. Hart vs. Davenport, 478 F2d. 203 (3d Cir. 1973), tends to support the defendant's allegation of prejudice resulting from the failure to file pre-trial motions. In Hart, six co-defendants who were charged with various gambling offenses were represented by the same attorney at trial. The evidence showed that the appellant Hart was employed as a bartender in an establishment owned by Mr. and Mrs. Batersby. A search of the premises resulted

in the seizing of evidence which tended to implicate Hart. Although the affidavit underlying the warrant which authorized the search was characterized by the Third Circuit Court as "palpably insufficient", counsel for the co-defendants made no pre-trial motions for suppression of the evidence.

After Hart was convicted, he appealed on the basis of ineffective assistance of counsel. Upholding his claim, the Court noted that, had an effort been made to separate Hart from the seized evidence, another defendant would have been further implicated:

> "Here, again, the predicament of counsel becomes clear, for any effort to negate Hart's connection with Exhibits S-9 and S-10 would have the inevitable tendency to focus attention on Battersby's role as a proprietor of a gambling enterprsse as well as a bar and grill."
>
> 478 F2d. at 208

The conflict between Holder and Sisca in the present case seems, if anything, more aggravated than the conflict in Hart. Here, had a successful suppression motion been made, Sisca's case would have been weakened, in that the Jury would not have been aware of the conspicuous absence of his voice in the wiretap evidence. This crucial evidence, if suppressed, would have, in effect, weakened Sisca's postiion in the eyes of the Jury and

would have strenghtened immesurably the stance of Holder and the other co-defendants. Accordingly, effective representation by the Gallina firm of both Sisca and the other defendants was not possible, and Holder's Sixth Amendment Rights were abridged The failure to ask that the wiretap evidence be suppressed is a specific showing of prejudice as required by Lovana.

The remaining question is whether the pre-trial inquiry was sufficient to afford the defendant's full understanding of the potential conflict, so that they may not now object to the joint representation. As heretofore noted, the trial Judge did not inquire as to whether the defendants were aware of the facts underlying the potential conflict. Thus, a breach occurred in the protection afforded by Alberti, and the inquiry became insufficient as a matter of law. Although in camera proceedings were suggested at the pre-trial hearing, the Judge did not feel that such proceedings were necessary.

Compare: United States vs. Vowteras, supra.

Finally, the Judge did not see to it that the defendants had guidance from independent counsel on the conflict issue.

Compare: United States vs. Sheiner, supra,; United States vs. Liddy, 348 F. supp. 198 (D.D.C. 1972).

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CONCLUSION

It is clear, that the defendant Holder has suffered a specific prejudice resulting from the joint representation. The burden lies on the Government to show otherwise. The pre-trial inquiry which attempted to alert Holder to the potential conflict of interest was insufficient to accomplish its purpose. Mr. Holder is entitled to have his sentence vacated and either to be released from custody, or to be granted a new trial.

Respectfully submitted,

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PROPOSED FINDINGS OF FACT AND FACT AND CONCLUSIONS OF LAW IN SUPPORT OF THE PETITIONER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERROLL HOLDER,

Petitioner,

76 CIV. 1424

vs.

UNITED STATES OF AMERICA,

Respondent.

PROPOSED FINDINGS OF FACT AND
FACT AND CONCLUSIONS OF LAW
IN SUPPORT OF THE PETITIONER

PROPOSED FINDINGS OF FACT AND FACT AND CONCLUSIONS OF LAW IN SUPPORT OF THE PETITIONER

I. PROPOSED FINDINGS OF FACT

It is respectfully submitted that based on the record in this cause of action that the court should find that the petitioner, Erroll Holder did not knowingly and intentionally waive his rights under the Sixth Amendment with a full awareness of the circumstances of the case and the likely consequences of his actions.

The record establishes that although Mr. Holder retained the Gallina firm to represent him prior to the arraignment that it wasn't until two days before the trial that he was assigned a trial counsel. At a meeting held in the office of the firm, Holder was introduced to John Pollock, the attorney who had been selected to represent him. (Tr., p.78). Mr. Pollock immediately raised the question of conflict of interest and for the first time the implications of a joint representation were explained to Mr. Holder.

Holder's assertion that he first fully discussed the case with a member of Gallina's firm two days before the trial (Tr. p. 72-73), is supported by implication by the testimony of Mr. Gallina. Gallina initially testified that he did not remember whether his firm represented Holder at trial. (Tr. p. 135). His memory refreshed, he later testified that a member of his firm "probably" represented Holder at the arraignment, (Tr. p. 144), but that he couldn't really recall when the representation of Holder began. (Tr. p. 145). Gallina did not recall whether

he ever had a full discussion with Holder concerning the issue of conflict nor did he have any recollection of any other lawyer in his firm discussing the issue with him. (Tr. pp 147-148). It was Gallina's belief that as of November 22, 1972, Mr. Pollock had the overall responsibility for representing Holder, (Tr. p. 154), but his recollection on this point is contradicted by both Pollock and Holder who agree that it was two days before the trial that Pollock first was ntroduced to Holder. (Tr. pp 72, 77-78).

Mr. Holder, therefore, in effect, was without counsel until two days before the trial. A notice of appearance had been filed on his behalf but he had never had the opportunity to fully discuss the case with a lawyer who was interested solely in representing him.

It is in this context that the events of November 22, 1972, should be examined.

Both Abraham and Holder testified that early in the morning of the 22nd they attended a meeting at Gallina's office. Present at the meeting were Mr. Gallina and five of the six defendants represented by his firm. The one defendant who did not attend was Mr. Sisca, the individual represented personally by Mr. Gallina. (Tr. pp 26, 48). At the meeting, the defendants were informed that the Government had filed a motion raising the questions of a potential conflict of interest

in an effort to split up the defense and to thereby increase their chances of getting one of the defendants to cooperate.

The testimony of Abraham and Holder as to the nature of the discussions at the meeting on the 22nd is, in effect, uncontroverted. Mr. Gallina, the only other participant in the meeting who testified, had no specific recollection of the meeting; (Tr. p. 107); in fact, he was not sure that a meeting took place at all just prior to the hearing, (Tr. p. 134, 158). He stated that he never called such a meeting. (Tr. p. 159)

Both Holder and Abraham testified that the only discussion of the conflict issue at this meeting was in connection with the Government's alleged efforts to split the defense. Holder indicated that at the time he did not know what a conflict of interest was and that no effort was made to explain the implications of the question to him. (Tr. p. 50). Gallina simply told him and the others that if the defendants were "split up" that "the Government would have an easier chance to convict everyone and that we would get lengthy prison terms, and we would probably blow all of our rights to the appeal." (Tr. p 51). Holder was not shown the Government's moving papers, (Tr. p. 48), and, in fact, as of the 22nd, he had never seen a copy of the indictment (tr. p. 48).

Holder and Abraham indicated that at this meeting they were instructed to answer whatever questions they were asked in court in a manner which would permit them to stay with the firm. (Tr. p 26, 54-55).

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Although Mr. Gallina cannot specifically remember the meeting he testified that he never gave any of the defendants specific instructions on how to respond to Judge Bryan's questions.

At the conclusion of the meeting on the morning of the 22nd the five defendant's and Mr. Gallina proceeded to Court where they were met by Mr. Sisca. Holder arrived in court with no real understanding of his legal rights, (Tr. p 59), with no understanding of what a conflict of interest really meant, (Tr. p. 57), but with his mind made up that he would do what he had to in order to prevent the Government from splitting up the defendants.

At the conflict hearing before Judge Bryan both the Government and Mr. Gallina presented their positions to the Court.

The Government argued that a potential conflict existed in the case and that

> ...at a minimum with respect to the finding of an informed consent and that in actuality each defendant would, in order to give a knowing and have proper advice on whether he should or should not seek individual counsel, have the advice of independent counsel on the question...(Conflict, p. 11)

Mr. Gallina indicated that he had fully discussed the matter with each defendant for hours; that no one wished to testify and that the Government was trying to shore up a weak case by dividing the defendants and preventing a unified defense. (Conflict, pp 6, 15-16, 22).

(Compare Gallina's testimony herein).

Holder has indicated that he didn't understand the import

of the remarks made by Mr. MacDonald before Judge Bryan (Tr. p 55).

The only discussion at the hearing before Judge Bryan as to the nature of the potential conflict in this case dealt with the possibility that as a result of the variance in the Government's proof against each defendant that in order to be adequately represented that each defendant should have their own counsel. (Conflict p.10).

No attempt was made to thoroughly and completely explore with the defendants all of the possibilities nor to explain to them how a conflict might arise and how it could potentially affect their individual defenses. The Court did not adopt the Government's position that independent counsel was necessary in order to insure that each defendant was adequately advised.

Each defendant was questioned individually by the Court but Judge Bryan did not explain how a conflict might arise or precisely how a conflict might affect each individual's defense.

Each defendant indicated when questioned that they wished to remain with the Gallina firm.

Mr. Holder responded to Judge Bryan's questions in a manner he believed would permit him to remain with the law firm. He did not understand the discussion as to the nature and effect of a conflict of interest (Tr. pp 55-59).

In conclusion, this Court should find that Mr. Holder never knowingly and intentionally waived his Sixth Amendment rights with a full understanding of both the consequences of his action and the relevant circumstances of the instant case. Mr. Holder,

who was functionally unrepresented by counsel at the time, responded to what he was told was an attempt by the Government to split the defendants. He responded without ever having fully discussed the case as it pertained to him with an attorney and therefore, could not have acted knowingly.

II. CONCLUSIONS OF LAW

The federal courts have long held that "(T)o preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." Glasser v. U.S., 315 U.S. 60, 70 (1942). A waiver must be an intentional relinquishment of a known right. Johnson v. Zerbst, 304, U.S. 458 (1938). A waiver in order to be valid needs to be not only voluntary, but also the product of "knowing intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970).

In order to determine whether a defendant has waived his Sixth Amendment rights to the effective assistance of counsel the trial Court should fully explain the nature of the potential conflict of interest; the disabilities that it may place on counsel in the conduct of the defense and the nature of the potential claims a defendant

will be waiving if he or she elects to proceed in a conflict situation. U.S. v. Armedo-Sarmento, 524 F. 2d 591 (2d Cir 1975). The hearing before Judge Bryan failed to meet the standards set out in Sarmento. The Court never explained the precise nature of the conflict or how it might arise. The defendants were not told the rights they may be waiving or the effect of such a waiver on the conduct of their defense.

The fact that Judge Bryan questioned each defendant individually does not end the inquiry. In Von Moltke v. Gilhes, 332 U.S. 708 (1948), the Supreme Court in reviewing a defendant's waiver of counsel stated, in language that has an equal application to the question before this court, that

> ...The fact that an accused may tell him (a Judge) that he is informed of his right to counsel and desires to waive this right does not automatically end the Judge's responsibility. To be valid such waiver must be made with an appreciation of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A Judge can make certain that an accused's professed waiver of counsel is understandingly, and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered. (332 U.S. at 723).

Judge Bryan's inquiry herein did not go far enough. No effort was made to advise each of the defendants of the facts underlying the potential conflict or how the conflict might arise. (cf U.S. v. Alberti, 470 F. 2d 878 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973).

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The trial court did not adopt the Government's request that independent counsel be appointed to advise the defendants. In U.S. v. Sheiner, 410 F.2d 337 (2d Cir. 1969), cert denied, 396 U.S. 825 (1969), the Court of Appeals indicated, in deciding that the defendant had waived a conflict of interest issue, that an important factor in judging the freedom of the defendant's choice was the fact that he had consulted independent counsel before deciding to proceed. (see also United States v. Liddy, 348 F. Supp. 198 (D.D.C. 1972), where the defendants also consulted with outside counsel prior to deciding to remain with one attorney.)

Furthermore, the trial court herein, made no attempt to have each defendant do more than respond to a series of questions from the bench. No effort was made to have the defendants personally articulate his intentions in his or her own words or to go beyond the assurances of Mr. Gallina that each defendant had fully discussed all facets of the issue (cf U.S. v. Garcia, 517 F.2d 272 (5th Cir. 1975).

Mr. Gallina's statements to Judge Bryan do not square with his testimony in the instant case. He told Judge Bryan that he had fully discussed the case with each defendant for hours yet he testified in the instant proceedin that he had no recollection of any direct discussions with Mr. Holder.

A fuller inquiry by Judge Bryan might have brought this apparent contradiction to light and would certainly have affected the trial court's determination of the voluntariness ond informed nature of the

proposed waiver.

Mr. Holder's actions on November 22, 1972, made in the absence of any kind of full discussion with any attorney should not be held to be a knowing, intelligent intentional relinquishment of a known right.

CONCLUSION

THE PETITIONER'S MOTION PURUSANT TO 28 U.S.C. §2255 SHOULD BE GRANTED, THE JUDGMENT IN 72 Cr. 1150 SHOULD BE VACATED AND A NEW TRIAL SHOULD BE GRANTED.

Respectfully submitted

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DENNIS BLACK, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 880 THERIOT AVE, BRONX, N.Y.

That on the 23 day of NOVEMBER, 1976, deponent personally served the within BRIEF FOR PETITIONER-APPELLANT AND SUPPLEMENTAL APPENDIX upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

HON. ROBERT B. FISKE, JR.
UNITED STATES ATTORNEY
ATTORNEY FOR RESPONDENT-APPELLEE
ONE ST. ANDREWS PLAZA
NEW YORK, N.Y.

Dennis Black

Sworn to before me this
23rd day of November, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978